APPENDIX

District Court of the United States

For the Northern District of Texas
Dallas Division

Civil Cause No. 884

FOY O. WILEMON, ET AL
VS.
PRENTISS M. BROWN, ET AL

SUIT TO RESTRAIN THE ENFORCEMENT OF A PENALTY

HOWARD DAILEY, Dallas, Texas,
for the Plaintiffs;

FLEMING JAMES, JR.,
LOWELL J. GRADY and
AMOS COFFMAN, Washington, D. C., and
WILLIAM B. HARRELL, Dallas, Texas,
for the Defendants.

OPINION OF THE DISTRICT COURT

The plaintiffs seek to restrain the enforcement of an order wherein they are "suspended, restrained and en-

joined from selling, transferring or dealing in gasoline for a period of two weeks, * * *. They claim they do a large volume of business as retailers of automobile necessities, buying their products from refiners and selling at retail to consumers who drive into their stations.

That on May 1st, 1943, they were served with an order charging them with having violated certain provisions of Ration Order 5C issued by the Administrator of the O. P. A. That there were four distinct violations alleged, the fourth of which was that on April 8, 1943 they had in their possession 1063 No. 6 Class A ration coupons which they had accepted in exchange for gasoline prior to the effective date of such coupons. That upon a hearing held in accordance with the regulations made by said Administrator, they were absolved from three of the charges, but were found guilty of "having in their possession the coupons mentioned which they had accepted in exchange for gasoline prior to the effective date. That they had not wilfully violated this provision, but they had been guilty of gross negligence and carelessness, warranting a severe penalty." He also held that they were "suspended, restrained and enjoined from selling, transferring or dealing in gasoline for a period of two weeks."

From that order the plaintiffs appealed to the "Hearing Administrator" at Washington, D. C., who held that the order should be enforced against them to begin at 12:01 A. M., August 8, 1943, and to end at 12:01 A. M., August 23rd. They plead facts showing damages in ex-

cess of $3,000.00, as a result of that order, if it is permitted to stand.

The order was stayed pending the trial on the merits of this suit wherein preliminary restraining orders were waived. Upon the trial the facts were stipulated. This stipulation fixes their damages at approximately $10,000.-00. Testimony accompanying the stipulation shows that a Mrs. Wolfe, an employee of the plaintiffs, telephoned to the O. P. A. Dallas office and asked about coupons that had been improvidently taken before they were valid. She claims that a woman who answered the phone, told her that she could hold the coupons and turn them in to the refinery after they became valid.

The authority of any employee in the O. P. A. office to make such a statement is denied by the superintendent. It must be assumed, however, that something of that sort transpired, because the "Hearing Administrator" declared that the holding and taking of the coupons was not wilful. The record also discloses that in the early days of allocation that procedure may have been indulged in by some dealers.

The plaintiffs claim that their Constitutional rights have been invaded in that there was no sufficient delegation of authority from the Congress to the President, nor by the President on down through the line of delegation, for the imposition of such an order. That it was, and is, an attempt to set up a court and to take their property

without due process. Appropriate sections of the Constitution are plead.

Ration Order 5C is labeled, "Mileage Rationing; Gasoline Regulations." It became effective on December 1st, 1942. (7 F. R. 9798). It provides, "Any person who violates that Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline or other rationed product, or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

The pedigree of that order is Sec. 2 (a) Act June 28, 1940, 54 Stat. 676, as amended by Act May 31, 1941, 55 Stat. 236, entitled, "Priorities and Allocations Act," and by Title III of the Second War Powers Act, 1942, March 27th, 56 Stat. 176, 50 U. S. C. A., Appendix 636.

On February 6th, 1943, the Administrator issued Procedural Regulation No. 4, effective March 1st, 1943, which provided for a hearing before a "Hearing Administrator" and for suspension decrees. 8 F. R. 1744, 2035.

If there was authority for the procedural order it sufficently guarded the safety and rights of the plaintiffs.

Only those coupons are valid from consumer to dealer which so show on their face, and gasoline may not be trans-

ferred for any other than valid coupons. The 1063 coupons represented an aggregate of 4252 gallons. They were accepted six weeks before they were valid.

There is no question of the plaintiffs' right to enter court. They have pursued to a finality their Administrative remedy. Nor is there any doubt that the Congress gave the President the authority to allocate any material or facilities for defense "upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense." The Congress also authorized the President to exercise "any power, authority, or discretion conferred on him by this section, through such department, agency or officer of the government as he may direct, and in conformity with any rules and regulations which he may prescribe."

On September 8th, 1939, the President had issued a declaration that a national emergency existed, and there followed the executive decree formulating and appointing the bureaus and executive officers, through which the various steps of this proceeding were carried. It must be conceded that the power of allocation is validly entrusted to the Executive.

The defendants claim, and their claim seems well taken, that at the time of the passage of the Second War Powers Act, which re-enacted Sec. 2 (a) of the Priorities and Allocation Act in Title III, the Congress knew that the Boards had been claiming the power to, and, in fact, had

been issuing suspension orders against dealers whom they claimed had violated the rationing regulations. (Senate Report 989, 77th Congress, Second Session). (88th Congress Record February 24, 1942, page 1634). The Attorney General sought and secured criminal remedies, claiming that Administrative suspensions, although highly important, did not provide a proper penalty in every case.

Without stopping to cite pertinent authorities, we, therefore, have a situation which indicates validity in the entire procedure, with the exception of the right of the "Hearing Administrator" to fix a penalty such as was here imposed.

If we consider the breadth and scope of the order entered against the plaintiffs, we find considerable difficulty in concluding that it is "merely remedial." It is not the legitimate outgrowth of the right to allocate, or to ration. It borders on a confiscation of the plaintiffs' business for two weeks. It destroys that business for that period. Both employees and customers are, and necessarily will be, demoralized. The loss will be heavy.

The facts show that there is no dispute about the possession of these inappropriate coupons. If gasoline had been exchanged for them, then that product had already left the stream which would supply the nation's needs. There is no charge that the coupons were to be, or were, in fact, used for another transfer. The damage, if damage there was, had already been done. When the valid

date for the use of such coupons arrived, they were passed on by the plaintiffs and used in the replenishing of their tanks.

One always feels the poverty of words when it comes to defining the simple. This case really must be ruled by deciding whether this order was remedial or punitive.

The Supreme Court in *Wallace vs. Cutten*, 298 U. S. 229, quite briefly, and quite in point, denied an Administrative body similar punitive power. See also *United States vs. LaFrance*, 282 U. S. 568; *O'Sullivan vs. Felix*, 233 U. S. 318; *Simon Hardware Company vs. Nelson*, District Court of Columbia, decided September 17, 1943, and not yet reported.

The Congress did not vest in the defendants such a power as is here exhibited. If it did, it presumed to act improperly, which presumption will not be indulged. We must find that it acted constitutionally, if possible, and lay the blame where it belongs, to-wit, on the "Board."

Remedial cases are such as afford summary adjustment through extraordinary writs, such as prohibitions, mandamus, certiorari and quo warranto. *State vs. St. Paul*, 28 N. W. 245; 7 *Words and Phrases*, 6075. Punitive is punishment for past wrongdoing, as well as to deter the defendant and others in a similar business from repeating such wrongdoing in the future. *Oliver vs. Columbia*, 43 S. E. 307. It is not thought that an order carrying results such as this one can be said to be anything other than a

penalty—than punitive. The wages of transgression are the loss of business—the loss of money—the loss of actual property right. Penalty is defined as a punishment imposed for a violation of a rule or a law. A painful consequence of any disadvantage attached to some procedure, as a penalty for carelessness. A disadvantage imposed upon a competitor for an infraction of the rules.

The "Hearing Administrator" unknown to and unprovided for by the Congress, presumes to conduct a court. Procedure is prescribed by his superior for such conducting. He enters a judgment concerning which there is no limit fixed. No maximum. No minimum. He acts without any fear of consequences for malfeasance, or misfeasance. If he can suspend for two weeks, he can suspend for two years. He is not only unknown to the Congress, but he is unknown to the Constitution. Art. 3, Sec. 1, vests such power in one Supreme court, and in such inferior courts as Congress may from time to time ordain and establish. The judges hold during good behavior, and receive a stated compensation. They must be appointed by the President and confirmed by the Senate. They may be impeached.

What the "Hearing Administrator" does is beyond the reach of Executive forgiveness. He, himself, is beyond the reach of any Constitutional removing power. He is a modern instance of pure dictatorship.

Sec. 2 of the same Article, vests this sort of power in all cases arising under the Constitution. This is a case that

arises directly under the Constitution because of the declaration of war and the following of that declaration by the passing of the statutes out of which grow the delegations of authority for allocation. As a result of such delegation of authority, there was conceived and born a "Hearing Administrator" who is and was without Constitutional father or mother. No attempt at baptism in the waters of conflict can change his parentage and make it legitimate.

This view of a penalty, or, punishment, is sustained by a further reading of the Allocation Act, which provides for the criminal punishment of the citizen who violates its provisions, and also for equitable restraints, both of which take place in named courts.

Even the gasoline which was legally acquired, may not be sold for two weeks. The business is closed. The same contention was made by the Administrator in *Wallace vs. Cutten*, supra, that is made here. The commission claimed that in depriving Cutten of the right to trade for a period that they acted remedially and not punitively.

An unanimous court, speaking through Mr. Justice Brandeis, said that, "What the government asks is not a construction of the statute, but, in fact, an enlargement of it by the court, so that what was omitted, presumably (possibly) by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. A fortiorari it may not be done for the purpose of mak-

ing punishable that which on the face of the statute, is merely prevented." There is nothing in *Union Bridge Co. vs. United States*, 204 U. S. 364 that weakens the position.

This question as to the nature of the order is one of fact which must be judicially determined. *Kessler vs. Strecker*, 307 U. S. 22. Power may not be delegated Constitutionally in the absence of well-defined limits, nor can it be delegated at all to do what the Constitution forbids, or, vests in a different sphere. The court must exercise some degree of supervision over the activity of an Administrative body. Someone must have the power to say whether the Congress has complied with its charter of authority in the enactment of a statute. There can be no fault found with this statute so far as the Congress is concerned. The fault is with the Board or the persons who seek to act under the statute. The court is the repository of this power to scrutinize. An Administrative tribunal cannot be permitted to be the final judge of its own compliance with the law.

Having in mind all of the Constitutional reach that is bestowed during the existence of War, a judgment such as this cannot be permitted to stand unchallenged. The restraint prayed for should be granted. This decision should not be construed as going any further than is specifically

indicated, to-wit, an order which fixes a penalty under this Act such as was entered here is invalid.

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United States District Judge.

Done at Dallas, Texas,
this the 29th day of
September, A. D. 1943.

United States Circuit Court of Appeals

For the Fifth Circuit

No. 10840

PRENTISS M. BROWN, Administrator, Office of Price Administration, et al., (CHESTER BOWLES, Substituted as Party Appellant in the Place and Stead of Prentiss M. Brown)

Appellants,

VERSUS

FOY O. WILEMON and AMOS E. WILEMON, Doing Business Under the Trade Name of Good Luck Oil Company, a Partnership,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS

Opinion of the Circuit Court
(January 13, 1944)

Before SIBLEY, HOLMES and WALLER, Circuit Judges.

SIBLEY, Circuit Judge: The appellees, plaintiffs below, are liencesed operators of gasolene filling stations in Dal-

las, Texas. Under the allocation regulations of the Office of Price Administration they registered as distributors and undertook to make the required reports. On May 6, 1943, a hearing was set to ascertain whether because of violations of the rationing order 5C they should be suspended from dealing in gasolene. The Hearing Commissioner found that appelleees had during April sold some 4,000 gallons of gasolene on 1063 rationing coupons six weeks before the coupons were usable; and he ordered that appellees "be prohibited from selling, tranferring or dealing in gasolene for a period of two weeks." On appeal the Hearing Administrator confirmed the order, declining to consider whether the Hearing Commissioner had constitutional authority to make such suspension orders. Thereupon appellees applied to the district court for an injunction on the ground that legislative power was being exercised in imposing punishments and penalties not authorized by Congress, and judicial power in trying the right of appellees to continue in business, in violation of Articles 1 and 3 of the Constitution. The District Court held the suspension order was punitive and not remedial, and that Congress had vested no power in the President and his agencies to fix punishments or to adjudge them, and that injunctive and penal remedies in the District Court provided in Section 205 of Title II of the Act of Jan. 30, 1942, 56 Stats. 33, are alone to be pursued. The injunction was granted. —— Fed. Sup. —— This appeal followed.

The district courts have differed on the questions presented. Typical of the opposite view is another case in the

Fifth Circuit, Perkins v. Brown, —— Fed. Sup. —— We think the case last cited takes the sounder position. The statutory authority for what has been done must be found in the following words: "Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in the shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense." sec. 2 (a) 2 of the Act of June 18, 1940, as amended by the Act of May 31, 1941, 55 Stats. 236. Section 2 (a) 2 permits the President to act through such agency or officer as he may direct, "and in conformity with any rules or regulations which he may prescribe." The allocation of gasolene came to be vested in the Office of Price Administration, and ration order 5C (7 Fed. Reg. 9135) was issued whereby the gasolene allocated for use by civilian consumers was regulated through the issuance to them of ration coupon books. These coupons are to be taken up by the filling stations when gasolene is sold, and may not be honored before their due date. Section 1394.-8302 of ration order 5C provides that any person who violates the ration order may "by administrative suspension order" be prohibited from receiving, selling, using or disposing of gasolene for such period as is deemed "necessary or appropriate in the public interest and to promote the national security." The suspension order, whether direct-

ed against the filling station operator or the consumer himself, thus professes to be an administrative order intended to promote the national security, rather than a penalty.

That it may so operate seems clear to us. The allocation of gasoline is first of all between the military and civilian users. That allocated to civilian users must also be rationed according to the fair needs of all and with reference to their contribution to the defense effort. The distribution to civilian consumers might have been made through government establishments which would have put all filling stations out of business for the period of rationing. Instead of doing that, the filling stations were required to register as distributors and to make reports from which the operation of rationing could be checked. Though no license was issued, such was the effect of the arrangement; and by acceptance of it the filling station operators impliedly agreed to abide by the regulations. They became in effect the appointees of the government to assist in the administration of the rationing. If any of them should prove untrustworthy or non-cooperative, we think it a fair exercise of administrative power to withdraw from such, temporarily or permanently, the privilege of distributing the allocated and rationed material. That this was provided for by regulation in advance does not alter the essence of the matter. That a business loss will be caused, or more accurately the failure to make an anticipated business profit, is also not controlling. The true purpose must be held to be to protect the efficacy of rationing rather than to punish for past misdeeds.

By this Act a wilful violation of the regulations is made a criminal offense punishable by fine and imprisonment. Also injunction is provided in some cases, the final effort of which is imprisonment for contempt in case of further wilful violation. The present case is not one of wilfulness but negligence. The Hearing Administrator explained his action thus: "The privilege of dealing in and distributing such a strategic and rationed commodity as gasoline in time of war can be accorded only to those who are both willing and able to comply with the rationing regulations. . . . Thus wilfulness is not a necessary element in establishing a violation of a ration order. The purpose of suspension order proceedings is to determine whether a respondent may continue to be entrusted with the privilege of dealing with rationed commodities without further limitations." The privilege in a proper case can be taken away altogether. A less drastic cautionary suspension is also within the limits of appropriate administration.

Punishment or penalty in America consists in taking life, liberty, or property. A suspension order takes neither. The dealer's personal liberty is untouched. Nothing that is really his is taken from him. His filling station is unmolested and may be used to sell things other than gasoline, and to service cars. Even his gasoline is not taken from him. He is prohibited for a brief period from distributing it or from getting any more. There is damage by the interruption of his business, but damnum absque injuria. His private interest has merely come into collision with a public interest, and has had to yield.

In the railroad business, it is of the utmost importance that enginemen be skilful and reliable. Their jobs are secured by union agreements, and suspension or dismissal commonly cannot be visited without a hearing. But although suspension or dismissal necessarily causes a financial loss, it has never been denied that such discipline is a legitimate exercise of railroad management and administration. It seems reasonable to us that a similar power be considered to vest in the Administrator in using the filling station operators to assist in the work of rationing. A suspension order which affects nothing but the rationed gasoline is a proper implementation of rationing, and was at once used without special legislative mention. It was not substituted or superseded by the punitive provisions later added to the Act to stop wilful misconducts.

It is true that the Office of Price Administration, like many other administrative boards and commissions, has put forth a great mass of regulations which look like legislation, and has established an elaborate system of quasi courts. It is said thus to have established an imperium in imperio, and this has provoked adverse public comment. We confine ourselves to the case before us. We do not think a penalty has been ordained or adjudged in such a sense as to require the action of Congress and a court; but that observance of rationing rules may as a matter of administration be made "a condition" of participation in

allocation, as mentioned in the Act, and that temporary suspension is a proper enforcement of the condition.

The judgment is reversed and the cause remanded with direction to dismiss the complaint.

REVERSED.

A True copy:
Teste:

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Clerk of the United States
Circuit Court of Appeals
for the Fifth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1943

E. C. WILLAMON AND AARON T. WILLAMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LOOK OIL CO., INC., A PARTNERSHIP, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	5
Discussion	10

CITATIONS

Cases:	
Nichols & Co. v. *Secretary of Agriculture*, 131 F. (2d) 651	11
Securities & Exchange Commission v. *Torr*, 22 F. Supp. 602	11
Steuart & Brother, L. P. v. *Bowles*, No. 793, present Term	10, 11, 12
United States v. *Globe Indemnity Co.*, 94 F. (2d) 576, certiorari denied, 304 U. S. 575	11
Statutes:	
Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 177, 50 U. S. C. App. (Supp. III), sec. 633 et seq.): Section 2 (a)	2, 3
Second War Powers Act, Title III	4, 10
28 U. S. C. 380a	8
Miscellaneous:	
Executive Order 9125 (7 Fed. Reg. 2719–2720)	4
General Order No. 46 (8 Fed. Reg. 1771)	5
Procedural Regulation No. 4 (8 Fed. Reg. 1744)	5
Ration Order 5C (7 Fed. Reg. 9135–9160, as amended, 8 Fed. Reg. 10364)	3
Section 1394.7652	3
Section 1394.8152	7
Section 1394.8302	4
Section 1394.8302, as amended on March 2, 1943 (8 Fed. Reg. 2720)	4
Rules of Civil Procedure, Rule 15 (d)	9
War Production Board Directive No. 1 (7 Fed. Reg. 562)	4
War Production Directive I–Q (7 Fed. Reg. 9121)	4

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 854

FOY O. WILEMON AND AMOS E. WILEMON, DOING BUSINESS UNDER THE TRADE NAME OF GOOD LUCK OIL COMPANY, A PARTNERSHIP, PETITIONERS

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 99–106) is reported in 51 F. Supp. 978. The opinion of the Circuit Court of Appeals (R. 114–117) is reported in 139 F. (2d) 730.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Fifth Circuit was en-

tered on January 13, 1944 (R. 118). The petition for a writ of certiorari was filed in this Court on April 6, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the power granted to the President by Section 2 (a) of the Act of June 28, 1940, as amended by the Act of May 31, 1941, and by Title III of the Second War Powers Act (Act of March 27, 1942), to allocate materials "in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense," includes the power to limit or withdraw an allocation of a dealer in rationed commodities because he has violated the conditions upon which he was permitted to participate in the allocation system.

STATUTES AND REGULATIONS INVOLVED

The case involves the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 177, 50 U. S. C. App. (Supp. III), sec. 633 et seq.). Section 2 (a) (2) reads, in part:

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any

> material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.

Sections 2 (a) (5) and (6) provide for criminal and civil enforcement suits against persons violating the Act or regulations and orders issued thereunder. Section 2 (a) (8) authorizes the President to exercise his powers through such agency or officer as he may direct and in conformity with rules which he may prescribe.

Ration Order 5C (7 Fed. Reg. 9135–9160), provided for the rationing of gasoline. Section 1394.7652 read:

> Coupons contained in Class A books shall be valid for the transfer of gasoline to a consumer only during the periods indicated below.

Coupons numbered	Valid period
3.	November 2, 1942, to January 21, 1943, inclusive.
4.	January 22, 1943, to March 21, 1943, inclusive.
5.	March 22, 1943, to May 21, 1943, inclusive.
6.	May 22, 1943, to July 21, 1943, inclusive.

Section 1394.8302, as amended on March 2, 1943 (8 Fed. Reg. 2720, 2721), reads:[1]

> Suspension orders.—Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline, tire or passenger automobile. Proceedings for the issuance of suspension orders shall be instituted and governed pursuant to the provisions of Procedural Regulation No. 4.

By Executive Order 9125 (7 Fed. Reg. 2719–2720) the President had conferred his power under Title III of the Second War Powers Act on the War Production Board and confirmed War Production Board Directive No. 1 (7 Fed. Reg. 562) which lodged in the Office of Price Administration certain of the Board's allocation power under the earlier acts. By supplementary Directive 1–Q (7 Fed. Reg. 9121), the War Production Board had delegated to the Office of Price Administration specific authority over the rationing of gasoline.

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[1] Prior to its amendment, section 1394.8302 read:

"Suspension orders.—Any person who violates this Ration Order No. 5C may, by administrative suspension order, be prohibited from receiving any transfers or deliveries of, or selling or using or otherwise disposing of, any gasoline or other rationed product or facility. Such suspension order shall be issued for such period as in the judgment of the Administrator, or such person as he may designate for such purpose, is necessary or appropriate in the public interest and to promote the national security."

The Office of Price Administration conferred on its Hearing Commissioners and Hearing Administrator the function of issuing suspension orders. General Order No. 46 (8 Fed. Reg. 1771). At the same time it adopted procedural regulations governing their issuance. Procedural Regulation No. 4 (8 Fed. Reg. 1744).

STATEMENT

Petitioners seek review of a judgment of the Circuit Court of Appeals for the Fifth Circuit which reversed the judgment of the district court (R. 107) permanently enjoining the respondents from putting into effect or enforcing a rationing suspension order.

On August 7, 1943, the petitioners brought suit in the district court to enjoin enforcement of a suspension order issued by the Office of Price Administration, prohibiting petitioners from dealing in gasoline for a two-week period. The petitioners are retail distributors of gasoline in Dallas, Texas, owning and operating seven large filling stations (R. 27). From December 1, 1942, to May 5, 1943, they sold more than 1,000,000 gallons of gasoline (R. 20, 55).

On May 1, 1943, the Office of Price Administration commenced proceedings, under Procedural Regulation No. 4, to determine whether a suspension order should be issued against petitioners. A Notice of Hearing was served charging petitioners with four types of violation of Ration

Order 5C (R. 14). One charge was that the petitioners possessed 1,063 No. 6 Class A ration coupons on April 8, 1943, which had been accepted in exchange for gasoline before their effective date (May 22, 1943).

Hearing was held on these charges before a Hearing Commissioner on May 17, 1943, with petitioners (the respondents in the administrative proceeding) appearing in person and by counsel (R. 27).[2] The charge of possessing 1,063 invalid coupons was readily admitted by petitioners (R. 19, 31, 78), but they asserted that their employee had telephoned to the County Ration Board for information and had been told by a lady clerk that they might hold such coupons until the date of validity and then turn this ration evidence[3] over to their suppliers for more gasoline (R. 64, 73). The office manager and chief clerk of the Ration Board, Mr. Guebert, testified that in the ordinary course of affairs a request for information such as the petitioners allegedly made would have been referred to him by the subordinate employees of the Board (R. 46–50).

The Hearing Commissioner by oral ruling narrowed the issue to the one charge of transfer to

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[2] The hearing had been adjourned from May 7, 1943, to May 17, 1943 (R. 27).

[3] "Ration evidence" means a token authorized by the Office of Price Administration to represent a right to receive a transfer of gasoline and exchangeable for such gasoline subject to the conditions set forth in the Order.

consumers of gasoline in exchange for invalid coupons, contrary to the provisions of Section 1394.8152 of Ration Order 5C (R. 98). On May 25, 1943, he issued a suspension order. This order forbade the petitioners from selling, transferring, or dealing in gasoline from June 14, 1943, to July 1, 1943, a two-week business period. (R. 17, 18.)[4] Pending an appeal to the Hearing Administrator, however, the operation of the suspension order was stayed (R. 27–28).

On July 20, 1943, the Acting Deputy Hearing Administrator affirmed the suspension order, vacated the stay, and advanced the term of suspension to run from August 8, 1943, to August 25, 1943 (R. 22).[5] He found that petitioners fell far short of minimum standards of care that may reason-

[4] Certain of the inaccuracies in the Petition should be noted at this point. It is stated (Pet. p. 9) that the district court quoted the Hearing Commissioner's finding that petitioners' conduct warranted "a severe penalty." In fact the district court was merely quoting petitioners' own complaint (R. 4) in the process of setting forth petitioners' arguments (R. 100). The Hearing Commissioner's order contained no such statement (R. 17–18). On page 21 of the supporting Brief the same sort of statement is attributed to the Hearing Administrator; we invite inspection of the Record reference given by petitioners (R. 21). The description, on page 10 of the Petition, of the "violation" as "an isolated one" is not a very precise statement of petitioners' conduct in accepting over 1,000 invalid coupons; and attribution of such a finding to the district court has no foundation in the Record.

[5] The Acting Hearing Administrator disqualified himself since he had been the Office of Price Administration Regional Attorney at the time the proceedings were commenced.

ably be expected of dealers in rationed commodities in critical times, and were willing to conduct large-scale operations contrary to the provisions of the Ration Order on the basis of an alleged informal conversation with a clerk (R. 21).

On August 7, 1943, the petitioners brought this action to enjoin enforcement of the suspension order (R. 1). The suspension order was administratively stayed pending the final determination of this cause (R. 28). The petitioners, in their complaint, specifically stated that they were not seeking to have an Act of Congress held unconstitutional (R. 8). They contended, however, that the creation of a Hearing Commissioner under the statute was in violation of Articles I and III of the Constitution on the ground that he was acting as a judicial officer under a mere administrative Regulation (R. 7); that Ration Order 5C was being used as a law contrary to Article I since it had not been passed by Congress (R. 6–7); and that an unconstitutional taking of property contrary to the Fifth Amendment was worked by assessment of a penalty by a person assuming to possess judicial powers (R. 7). Since the petitioners specifically disavowed any intention to attack an Act of Congress, and thus the single district judge obtained jurisdiction of which 28 U. S. C. Sec. 380a would have deprived him if there had been such a constitutional attack, the last-mentioned objection must be taken to mean

that the Fifth Amendment is violated because petitioners were suspended without statutory authorization for such administrative withdrawal of an allocation.[6] In a "Supplemental Petition" filed on September 25, 1943, without leave of court,[7] the petitioners further contended that no substantial evidence was adduced at the administrative hearing on this cause to show that they had violated the provisions of Ration Order 5C; and that they had acted in good faith upon advice of the Dallas County Rationing Board (R. 25, 26).

On October 2, 1943, the District Court permanently enjoined the putting into effect and enforcement of the suspension order solely on the basis of the lack of statutory authorization for such a suspension (R. 99–108).[8] The court, in its opinion, conceded that due process had been observed in the administrative hearing but concluded that the suspension order was beyond the powers given by Congress. On January 13, 1944, the Circuit Court of Appeals reversed the judgment below (R. 114–118).

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[6] Petitioners state (Pet. p. 8) that a question presented is the constitutionality of the Act. This should be compared with the complaint (R. 8), where such an attack is disavowed, and with the supporting Brief, at p. 51.

[7] See Rule 15 (d), Rules of Civil Procedure.

[8] Since the only question considered by the trial court was one of statutory authorization and the injunction issued was on the basis of lack of such authorization, the scope of review for abuse of discretion of a court of equity was not involved in the court below. (But cf. Pet. p. 8, and Point 3 of supporting Brief, p. 24.)

DISCUSSION

The only issue presented by the petition which would warrant review is the question of statutory authority for suspension orders in connection with rationing under the Second War Powers Act, *supra,* pp. 2–3. Cf. notes 6, 8, p. 9, *supra.* That question is before the Court in *L. P. Steuart & Brother* v. *Bowles,* No. 793, present Term.

The suspension order in the present case differs in its terms from that in the *Steuart* case, and the considerations underlying its issuance may be briefly stated. The violations calling for a short-term suspension in the instant case arose out of petitioners' negligent conduct of a large-scale enterprise handling a war-scarce commodity. Petitioners accepted gasoline coupons before the date of their validity. The limitation on the time during which gasoline coupons may be cashed in for the rationed good achieves three essential results. In the first place, the limitation of the period of coupon validity enables the Government to balance the total demand for gasoline by consumers possessing cashable current coupons with the total supply of gasoline that may be expected to flow into the hands of distributors. A fairly even consumer demand can thus be achieved and periods of complete drought can be avoided. In the second place, the period ration system spreads each consumer's use of gasoline so that he will not imprudently leave himself without supplies and

so that he may meet his basic driving needs during the entire year. Finally, the period system permits the Government to reappraise the value of gasoline coupons and assign new values, based on current supply, without unfair injury or advantage to consumers who have, on the one hand, saved their coupons or, on the other, expended them freely.

It should be remembered that petitioners accepted coupons whose value might be considerably smaller when they actually became valid, or even have no cashable value at all. Petitioners indulged in this practice contrary to the clear provision of the Ration Order and the understanding of even casual participants in the ration system. The only excuse offered was an alleged waiver of the provision by a subordinate clerk of a local Ration Board. The Government cannot thereby be estopped (*Nichols & Co.* v. *Secretary of Agriculture,* 131 F. (2d) 651 (C. C. A. 1st); *United States* v. *Globe Indemnity Co.,* 94 F. (2d) 576, 578 (C. C. A. 2d), certiorari denied, 304 U. S. 575; *Securities & Exchange Commission* v. *Torr,* 22 F. Supp. 602, 612 (S. D. N. Y.)). The need for a cautionary order for such irresponsible and negligent conduct seems clear.

Because of the pendency of the same question of law in the *Steuart* case, the Government does not oppose the petition for certiorari but suggests

that action thereon may properly be withheld until decision is rendered in the *Steuart* case.

Respectfully submitted.

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